

**Dato' Seri Tiong King Sing v
Datuk William Lau Kung Hui & Anor**

HIGH COURT (SIBU) — CIVIL APPEAL NO 12-23 OF 2001
CLEMENT SKINNER J
13 JUNE 2003

Civil Procedure — Appeal — Appeal from subordinate court to High Court — Plaintiff's claim against first defendant for payment of RM50,000 which plaintiff lent to second defendant on the strength of an oral guarantee given by first defendant — Sessions court struck out claim on grounds that claim was frivolous vexatious, scandalous and/or was an abuse of the process of court — Sessions court judge proceeded to hear first defendant's application without first reaching decision on whether or not an oral guarantee had been given — Whether sessions court arrived at a finding of fact without hearing evidence on the point and without giving plaintiff opportunity of presenting his evidence

Civil Procedure — Striking out — Action — Plaintiff's claim against first defendant for payment of RM50,000 which plaintiff lent to second defendant on the strength of an oral guarantee given by first defendant — Sessions court struck out claim on grounds that claim was frivolous vexatious scandalous and/or was an abuse of the process of court — Whether it was a plain and obvious case to strike out the action — Whether claim was obviously unsustainable on the face of it — Whether pleadings disclosed some cause of action or raised some question fit to be decided by the judge

This was the plaintiff's appeal against the decision of the learned sessions court judge who struck out the plaintiff's claim against the defendants on the grounds that the claim was frivolous, vexatious, scandalous and/or was an abuse of the process of court. The plaintiff's claim against the first defendant ('D1') was for the payment of RM50,000 which the plaintiff lent to the second defendant ('D2'), allegedly on the strength of an oral guarantee given by D1 to the plaintiff to repay the said sum if D2 did not do so within two months of being given the loan. D1's defence was that there was no oral guarantee given to the plaintiff as alleged, but that if there was one given then it was unenforceable by virtue of s 4 of the Statute of Frauds 1677 ('Statute of Frauds'), which D1 contended was still applicable in Sarawak. Section 4 of the Statute of Frauds stated that 'no action shall be brought whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriage of another person unless the agreement upon which such action shall be brought or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith or some other person thereunto by him lawfully authorized'.

Held, allowing the appeal:

(1) Under any of the limbs of O 18 r 19(1) Rules of the High Court 1980 ('RHC'), which was the equivalent to O 14 r 21(1) Subordinate Courts Rules 1980 ('SCR'), the court should only strike out a claim in plain and obvious cases or where the claim was

obviously unsustainable on the face of it. So long as the pleadings disclosed some cause of action or raised some question fit to be decided by the judge, the fact that the case was weak and not likely to succeed at the trial was no ground for the pleadings to be struck out. When a party applied to strike out his opponents' pleadings under O 18 r 19 of the RHC on a ground other than ground 1(a) of O 18 r 19, which was the case here, in deciding the application, the court was not confined to looking at the pleadings only but also the affidavits and documents that had been filed by the parties (see p 349F–H); *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36 followed.

- (2) D1's first line of defence was that no such oral guarantee was given as alleged, but that if there was one then his second line of defence was that it was not enforceable by virtue of s 4 of the Statute of Frauds. The two documents produced by the plaintiff indicated that there was some discussion between the plaintiff and D1 regarding the RM50,000 advanced to D2. Therefore, on the state of the pleadings and what was said in the affidavits and documents before the court, it was not difficult to see that a serious dispute of fact had arisen on whether an oral guarantee was given at all, and in the light of the affidavit and documentary evidence, the plaintiff's claim of having been given an oral guarantee by D1, could not be described as a frivolous or vexatious or scandalous claim or one made in abuse of the process of court. The seriously disputed question which had arisen between the parties on this point could only be decided at a trial and not on the basis of disputed facts stated in the affidavits on the hearing of a summary application (see pp 350F–351A).
- (3) It was inappropriate for the learned sessions court judge to have proceeded to hear D1's application without first reaching a decision on whether or not an oral guarantee had been given. If a trial had been held to determine the first line of defence and if after hearing the evidence, the court came to a finding that no oral guarantee was given, that would put an end to the plaintiff's claim. However, if the court were to find that an oral guarantee had been given, then the court must go on to consider whether the Statute of Frauds was still applicable in Sarawak and, if so, whether the plaintiff had produced a sufficient memorandum in writing of the oral guarantee. Unfortunately in this case, D1 committed the learned sessions court judge to a course which led to her deciding that there was no sufficient memorandum in writing of the oral guarantee. It was inappropriate to do so because that decision necessarily involved the court in arriving at a finding of fact without the benefit of hearing evidence on the point. It was also inappropriate because the court had arrived at a finding of fact without the plaintiff having had the opportunity of presenting his evidence including evidence elicited through cross-examination relating to the circumstances in which the oral guarantee was given (see p 351C–G).

- A** (4) Even taking the approach which the learned sessions court judge did, it could not be said that by virtue of s 4 of the Statute of Frauds, the plaintiff's claim was not maintainable, vexatious and/or an abuse of the process of the court. This was because the issue of whether an oral guarantee was enforceable in Sarawak gave rise to a serious question. The court would have to decide as a matter of law on whether s 4 of the Statute of Frauds was still applicable in Sarawak or whether the law on guarantees was now governed by the provisions of the Contracts Act 1950, which had been extended to Sarawak since 1 June 1974. To resolve this issue the court would have to undertake a mature consideration of the various statutory provisions referred to by the parties. It was not suitable to decide this difficult question of law on a summary application (see p 352C-E).
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[Bahasa Malaysia summary]

- D** Ini adalah rayuan plaintiff terhadap keputusan hakim mahkamah sesyen yang bijaksana yang telah membatalkan tuntutan plaintiff terhadap defendan-defendan atas alasan-alasan tuntutan tersebut adalah remeh, menyusahkan, melampau dan/atau satu penyalahgunaan proses mahkamah. Tuntutan plaintiff terhadap defendan pertama ('D1') adalah untuk bayaran RM50,000 yang dipinjamkan oleh plaintiff kepada defendan kedua ('D2'), yang dikatakan atas kekuatan satu jaminan secara lisan yang diberikan oleh D1 kepada plaintiff untuk membayar balik jumlah tersebut jika D2 tidak berbuat demikian dalam tempoh dua bulan selepas diberikan pinjaman. Pembelaan D1 adalah bahawa tidak terdapat jaminan secara lisan yang diberikan kepada plaintiff seperti yang dikatakan, tetapi jika memang telah diberikan maka ia tidak boleh dikuatkuasakan menurut s 4 Statut Fraud-Fraud 1677 ('Statut Fraud'), yang D1 menegaskan masih terpakai di Sarawak. Seksyen 4 Statut Fraud menyatakan bahawa 'no action shall be brought whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriage of another person unless the agreement upon which such action shall be brought or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith or some other person thereunto by him lawfully authorized'.
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Disputaskan, membenarkan rayuan:

- H** (1) Di bawah mana-mana cabang A 18 k 19(1) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'), yang sama seperti A 14 k 21(1) Kaedah-Kaedah Mahkamah Rendah 1980 ('KMR'), mahkamah tidak sepatutnya hanya membatalkan satu tuntutan dalam kes-kes yang biasa dan jelas atau di mana tuntutan dengan nyata tidak boleh dikekalkan pada mulanya. Selagi pliding-pling menunjukkan suatu kausa tindakan atau menimbulkan beberapa persoalan yang sesuai untuk diputuskan oleh hakim, hakikat
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bahawa kes adalah lemah dan tidak mungkin akan berjaya semasa perbicaraan bukan satu alasan untuk pliding-plinging tersebut dibatalkan. Apabila satu pihak memohon untuk membatalkan pliding pembangkangnya di bawah A 18 k 19 KMT atas alasan selain alasan 1(a) kepada A 18 k 19, yang merupakan kesnya di sini, dalam memutuskan permohonan tersebut, mahkamah tidak terbatas untuk melihat pliding-plinging tersebut tetapi juga afidavit-afidavit dan dokumen-dokumen yang telah difailkan oleh pihak-pihak tersebut (lihat ms 349F-H); *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36 diikuti.

- (2) Pembelaan pertama D1 adalah bahawa tiada jaminan secara lisan telah diberikan seperti yang dikatakan, tetapi jika memang ada maka pembelaan keduanya adalah ia tidak boleh dikuatkuasakan menurut s 4 Statut Fraud. Kedua-dua dokumen yang dikemukakan oleh plaintif menunjukkan bahawa terdapat perbincangan antara plaintif dan D1 berkaitan RM50,000 yang didahulukan kepada D2. Oleh itu, berdasarkan keadaan pliding-plinging tersebut dan apa yang dinyatakan dalam afidavit-afidavit dan dokumen-dokumen di hadapan mahkamah, ia tidak sukar untuk melihat bahawa telah timbul satu pertikaian fakta yang serius sama ada satu jaminan secara lisan telah diberikan langsung, dan berdasarkan keterangan afidavit dan dokumentari, tuntutan plaintif yang telah diberikan satu jaminan secara lisan oleh D1, tidak boleh digambarkan sebagai remeh atau menyusahkan atau tuntutan melampau atau suatu yang telah dibuat dengan menyalahgunakan proses mahkamah. Persoalan yang dipertikaikan secara seriusnya yang timbul antara pihak-pihak pada masa ini hanya boleh diputuskan semasa perbicaraan dan bukan atas berdasarkan fakta-fakta yang dipertikaikan dalam afidavit-afidavit semasa mendengar satu permohonan terus (lihat ms 350F-351A).
- (3) Ia tidak sesuai bagi hakim mahkamah sesyen yang bijaksana untuk terus mendengar permohonan D1 tanpa terlebih dahulu tiba kepada satu keputusan tentang sama ada satu jaminan secara lisan telah diberikan. Jika suatu perbicaraan diadakan untuk menentukan pembelaan pertama dan jika selepas mendengar keterangan, mahkamah tiba kepada satu penemuan bahawa tiada jaminan secara lisan telah diberikan, ia akan mengakhiri tuntutan plaintif. Namun begitu, jika mahkamah mendapati bahawa satu jaminan secara lisan telah diberikan, maka mahkamah perlu mempertimbangkan sama ada Statut Fraud masih terpakai di Sarawak dan, jika begitu, sama ada plaintif telah mengemukakan satu memorandum bertulis yang memadai berhubung jaminan secara lisan tersebut. Namun begitu dalam kes ini, D1 telah mengkomitkan hakim mahkamah sesyen yang bijaksana kepada satu arah yang menyebabkan beliau memutuskan tidak terdapat memorandum bertulis yang memadai berhubung jaminan secara

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- A** lisan tersebut. Ia adalah tidak sesuai untuk berbuat sedemikian kerana keputusan tersebut memerlukan penglibatan mahkamah untuk tiba kepada satu penemuan fakta tanpa dapat mendengarkan keterangan tentang perkara tersebut. Ia juga tidak sesuai kerana mahkamah telah tiba kepada satu penemuan fakta tanpa plaintif diberikan peluang untuk mengemukakan keterangan beliau termasuklah keterangan yang dibangkitkan semasa pemeriksaan balas yang berkaitan dengan keadaan-keadaan di mana jaminan secara lisan tersebut telah diberikan (lihat ms 351C–G).
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- C** (4) Walaupun dengan mengambil pendekatan seperti yang telah diambil oleh hakim mahkamah sesyen yang bijaksana tersebut, ia tidak boleh dikatakan menurut s 4 Statut Fraud, tuntutan plaintif tidka boleh dikekalkan, menyusahkan dan/atau satu penyalahgunaan proses mahkamah. Ini adalah kerana persoalan tentang sama ada satu jaminan secara lisan boleh dikuatkuasakan di Sarawak menimbulkan satu persoalan yang serius. Mahkamah perlu memutuskan berdasarkan undang-undang sama ada s 4 Statut Fraud masih terpakai di Sarawak atau sama ada undang-undnag mengenai jaminan sekarang dikawal oleh peruntukan-peruntukan Akta Kontrak 1950, yang meliputi Sarawak sejak 1 Jun 1974. Untuk menyelesaikan persoalan ini mahkamah perlu membuat pertimbangan yang wajar tentang pelbagai peruntukan-peruntukan statutori yang dirujukkan oleh pihak-pihak. Adalah tidak sesuai untuk memutuskan persoalan undang-undang yang sukar ini melalui satu permohonan terus (lihat ms 352C–E).]
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Notes

- F** For cases on appeals from the subordinate court to the High Court, see 2(2) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 595–597. For cases on striking out actions, see 2(2) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 5604–5615.

G Cases referred to

- Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36 (folld)
Chew Siang Jin v Lau Chee Ching & Ors [2000] MLJU 771; [2001] 1 CLJ 822 (refd)
- H** *Law Tanggie v Untong ak Gantang & Anor* [1993] 2 MLJ 530 (refd)
Lee Phek Choo v Ang Guan Yau & Anor [1975] 2 MLJ 146 (refd)
Tay Guan Ho v Chin Huat Hin Co [1987] 2 MLJ 704 (refd)

Legislation referred to

- I** Civil Law Act 1956 ss 3(1)(c), (2), (3)(ii), 5(2)
 Contracts Act 1950 ss 1(2), 79
 Law Reform (Enforcement of Contracts) Act 1954 [UK]

Interpretation Acts 1948 and 1967 s 3

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Rules of the High Court 1980 O 18 r 19(1)

Rules of the Subordinate Courts 1980 O 14 r 21(1)(a)(b)(d), O 15(1)

Statute of Frauds 1766 s 4

Henry Ling (Ling & Wong) for the appellant.

Chew Peng Hui (Battenberg & Talma) for the respondent.

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Clement Skinner J: This is the hearing of an appeal brought by the appellant who was the plaintiff in the court below, against the decision of the learned sessions court judge who on 26 November 2001, struck out the plaintiff's claim against the respondent who was the first defendant in the court below, on the grounds that it was frivolous, vexatious, scandalous and or it was an abuse of the process of court. For convenience, I shall continue to refer to the appellant as the plaintiff and to the respondent as the first defendant.

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The plaintiff's claim against the first defendant is for payment of the sum of RM50,000 which he lent to the second defendant, allegedly on the strength of an oral guarantee given to him by the first defendant to repay the said sum if the second defendant did not do so within two months of being given the loan.

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The first defendant filed a defence to the plaintiff's claim. In essence, his defence is that there was no oral guarantee given to the plaintiff as alleged, but that if there was one given then it is unenforceable by virtue of s 4 of the Statute of Frauds 1677, which the first defendant contends is still applicable in Sarawak. That section (as amended) states that 'no action shall be brought whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriage of another person unless the agreement upon which such action shall be brought or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith or some other person thereunto by him lawfully authorized'.

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The first defendant filed his application to strike out the plaintiff's claim under O 14 r 21(1)(a)(b)(d) of the Rules of the Subordinate Courts 1980 on the grounds that:

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- (1) it disclosed no reasonable cause of action and/or;
- (2) it is frivolous, vexatious, and scandalous and/or;
- (3) it is an abuse of the process of the court.

When the first defendant's application came up for hearing, he abandoned his first ground under O 14 r 21(1)(a) and proceed to argue the application relying only on his second and third grounds ie that plaintiff's claim ought to be struck out as it was frivolous, vexatious, scandalous and an abuse of the process of court. His arguments found favor with the learned sessions court judge who found that as the Statute of Frauds 1766 was still applicable in Sarawak, the plaintiff's claim, being based on an oral guarantee, was unenforceable as there was no memorandum or note thereof in writing and hence must be struck out.

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A The plaintiff complains that the learned sessions court judge was wrong in striking out his claim because in having withdrawn his first ground of application, the first defendant must be taken as conceding that the plaintiff's action did disclose a reasonable cause of action against him. Proceeding on that basis, the plaintiff says that nothing had been disclosed in the affidavits or documents that would move the court to strike out the plaintiff's action as being either frivolous, vexatious, scandalous and or an abuse of the process of the court. According to the plaintiff, this was particularly so as he had in his affidavit of 5 February 2001, produced two document 'TKS1' and 'TKS2', evidencing the RM50,000 advanced to the second defendant, of which 'TKS1' was a letter written by the first defendant requesting for the advance to be made.

C The plaintiff also submitted that this was not a suitable case for the exercise of the summary jurisdiction of the court to strike out his claim because even on the first defendant's contention that he was not liable to the plaintiff on an oral guarantee because such a guarantee is unenforceable in Sarawak, such a contention gives rise to a serious question of mixed fact and law which is not suitable for disposal on a summary application. According to the plaintiff, the serious question which has arisen is whether the Statute of Frauds 1766 is still applicable in Sarawak in view of the extension, since 1 July 1974, of the Contracts Act 1950 to Sarawak. According to the plaintiff, s 79 of the Contracts Act 1950 expressly states that a guarantee may be either oral or written and so his claim against the first defendant remains fully enforceable and cannot under any circumstances be described as a frivolous or a vexatious or a scandalous claim or one that is brought in abuse of the process of court.

E Counsel for the plaintiff then addressed me at length on why s 4 of the Statute of Frauds is no longer applicable in Sarawak. In short, he relies on s 3(1)(c) of the Civil Law Act 1956 which states that 'Save so far as other provision has been made or may hereafter be made by any written law in force in Malaysia, the court shall, in Sarawak, apply the common law of England and the rules of equity, together with statutes of general application, as administered or in force in England on 12 December 1949, subject however to sub-s (3)(ii)'. Counsel also referred to s 5(2) of the same Act which provides for the application of English law in commercial matters in Sarawak ... 'unless 'in any case other provision is or shall be made by any written law ...'

H According to Counsel, s 79 of the Contracts Act 1950 is that 'other provision' or corresponding written law which is now in force in Sarawak and is the provision of law under which any question relating to a guarantee in Sarawak is to be decided, by reason whereof s 4 of the Statute of Frauds is no longer applicable in Sarawak. He also drew attention to the fact that certain cases which were relied on by the first defendant and which held that the Statute of Frauds was applicable in Sarawak, such as *Tay Guan Ho v Chin Huat Hin Co* [1987] 2 MLJ 704, *Lee Phek Choo v Ang Guan Yau & Anor* [1975] 2 MLJ 146 and *Law Tanggie v Untong ak Gantang & Anor* [1993] 2 MLJ 530 were either decided before the Contracts Act 1950 was extended to Sarawak on 1 July 1974 or did not consider the operation of

s 79 of the Contracts Act. Counsel also referred to *Chew Siang Jin v Lau Chee Ching & Ors* [2000] MLJU 771; [2001] 1 CLJ 822 which held that the Statute of Frauds had no application in Sarawak.

By way of reply to the submissions of the first defendant, the plaintiff said there are good reasons of policy for holding that a provision of English law must give way where our Parliament has enacted a law to cater for local needs. According to the plaintiff, the Contracts Act 1950 which is the applicable law in Malaysia was extended to Sarawak to harmonize and integrate contract laws including of suretyship in Malaysia, and it would be inconsistent with that intention if the enforceability of guarantees made in Sarawak is to be decided on a different basis to the other states in Malaysia.

The first defendant's case is that the learned sessions court judge was correct to strike out the plaintiff's claim against him because the plaintiff's claim being based on an oral guarantee, it is not maintainable in court by virtue of s 4 of the Statute of Frauds. According to counsel for the first defendant, it is vexatious for the plaintiff to proceed any further with a claim which he has no means of proving in the manner required by the Statute of Frauds. Counsel said it is scandalous and an abuse of the process of court to drag the first defendant through all the stages of a legal proceeding just so that at the end of the day the court can say that the plaintiff's claim is not maintainable. Counsel for the first defendant accordingly submitted that if a claim cannot be maintained in court or is one which has no chance of success, then it should be struck out on the grounds that it is frivolous, vexatious, scandalous and or an abuse of the process of the court.

Counsel for the first defendant then took me through a detailed and lengthy examination of the law and the statutory provisions found in s 4 of the Statute of Frauds, the Law Reform (Enforcement of Contracts) Act 1954 (United Kingdom), ss 3(1)(c), 3(3)(ii) and 3(3) of the Civil Law Act 1956, ss 1(2) and 79 of the Contracts Act 1950, and s 3 of the Interpretation Acts 1948 and 1967, to demonstrate why it must be held that s 4 of the Statute of Frauds is still applicable to contracts of guarantee made in Sarawak, and why its provisions are not inconsistent with s 79 of the Contracts Act.

Briefly stated, his contentions were that by s 3(1)(c) of the Civil Law Act, statutes of general application in force in England as at 12 December 1949 became applicable in Sarawak. The Statute of Frauds 1766 was one such statute. The Law Reform (Enforcement of Contracts) Act 1954 (United Kingdom) amended the Statute of Frauds so that in England, it remains applicable only to oral guarantees. By s 3(3)(ii) of the Civil Law Act, the importation of specific Imperial Statutes was preserved and if the Second Schedule of the Civil Law Act is referred to, the whole of the Law Reform (Enforcement of Contracts) Act 1954 is made applicable to Sarawak without modification. Therefore according to counsel, s 4 of the Statute of Frauds remains application in Sarawak today. As far as the Contracts Act 1950 is concerned, it was counsel's submission that there is no inconsistency between s 4 of the Statute of Frauds and s 79 of the Contracts Act 1950 because whilst s 79 deals with the substantive law on guarantees, s 4 Statute of Frauds is a procedural or evidential provision

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- A which prohibits an action from being brought on an oral guarantee unless it is evidenced by a sufficient memorandum in writing.

- With reference to the argument of the plaintiff to the effect that since the Contracts Act 1950 has been extended to Sarawak since 1 July 1974 and it contains provisions dealing with guarantees and so the Statute of Frauds will no longer be applicable in Sarawak because s 3(1)(c) of the Civil Law Act 1956 states that the statutes of general application in England will only apply where no other provision has been made by any written law in force in Malaysia, counsel for the first defendant submitted that the plaintiffs contention cannot be correct in view of the fact that s 3(1)(c) itself ends with the words 'subject however to sub-section (3)(ii)'. When s 3(3)(ii) is looked at, it will be seen that the Law Reform (Enforcement of Contracts) Act 1954 applies in Sarawak without the limitations stated in s 3(1)(c) including the proviso thereto. According to counsel, if that be the case, when one applies to Sarawak what, in England, is left of the Statute of Frauds, one is not concerned if there are any other provisions in Malaysia dealing with the matters remaining in the Statute of Frauds unless the other provisions in Malaysia specifically nullifies the Statute of Frauds or at least the matters dealt with in what remains of the Statute of Fraud. According to counsel, further confirmation of this position is found in the commencing words of s 3(3) of the Civil Law Act 1956 which say:

- E Without prejudice to the generality of sub-section 1(b) and (c) and notwithstanding subsection 1(c).

- Before considering the submissions of counsel, it is convenient to first state something of the law governing an application to strike out a pleading on the grounds relied on by the first defendant. In *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36, the Supreme Court held that the principles upon which the court acts in exercising its powers under any of the limbs of O 18 r 19(1) of the Rules of the High Court 1980 (which is the equivalent to O 14 r 21(1) of the Subordinate Courts Rules 1980), is that the court will only strike out a claim in plain and obvious cases and where the claim is obviously unsustainable on the face of it. The court also said that so long as the pleadings disclose some cause of action or raise some question fit to be decided by the judge, the fact that the case is weak and not likely to succeed at the trial is no ground for the pleadings to be struck out. It is also well settled that when a party applies to strike out his opponents pleadings under O 18 r 19 on a ground other than ground 1(a) of the rule, (which is the case here), the court, in deciding the application, is not confined to only looking at the pleadings but also the affidavits and documents that have been filed by the parties.

- H With regard to the expansions 'frivolous' 'vexatious' 'scandalous' 'an abuse of the process of the court', useful reference may be made to the *Malaysian High Court Practice, 2001 Desk Edition* where at pp 612 and 613 a commentary is found on them:

- I [18.19.4] Scandalous

This is taken to mean wholly unnecessary and irrelevant, not just unpleasant allegation. Therefore, 'the sole question is whether the matter alleged to be

scandalous would be admissible in evidence to show the truth of any allegation in the pleading which is material with reference to the relief prayed': per Lord Selborne LC in *Christie v Christie* (1873) LR 8 Ch App 499 at 503.

[18.19.5] Frivolous or vexatious

A pleading or part thereof will be struck out on this ground where it is shown to be obviously frivolous or vexatious or obviously unsustainable: *Attorney-General of the Duchy of Lancaster v London & North Western Railway Company* (1892) 3 Ch 274 at 277.

[18.19.7] Abuse of the process of the court

The court possesses an inherent jurisdiction to prevent an abuse of its process: *Raja Zainal Abidin bin Raja Haji Takchik & Ors v British-American Life & General Insurance Bhd* [1993] 3 MLJ 16 (SC); the use of the court process must be bona fide.

So, can the plaintiff's claim of being given an oral guarantee by the first defendant, be said to be wholly unnecessary and irrelevant to his claim of having advanced RM50,000 to the second defendant on the strength of such a guarantee, or can his claim of having lent money to the second defendant on the strength of the first defendant's oral guarantee be said to be so obviously frivolous or vexatious or so obviously unsustainable? or that his claim against the first defendant to recover the money lent is not a bona fide use of the court process? In my judgment, I do not think that any of the questions posed can be answered in the affirmative and I say so for the following reasons.

The plaintiff's claim is based on a oral guarantee allegedly given by the first defendant. In an affidavit affirmed on 5 February 2001 and filed in these proceedings, the plaintiff has set out the circumstances in which the first defendant is alleged to have given him the oral guarantee, how the sum of RM50,000 came to be advanced to the second defendant, and how the two documents 'TKS1' and 'TKS2' came to be made. The first defendant has in his affidavit affirmed on 12 January 2001 denied giving the oral guarantee, and has given his own version of why the money was paid to the second defendant. In the light of the above disputed facts, it is relevant to note that the first defendant's first line of defence is that no such oral guarantee was given as alleged, but that if there was one then his second line of defence is that it was not enforceable by virtue of s 4 of the Statute of Frauds. It must also not be overlooked that the two documents produced by the plaintiff and in particular the letter 'TKS1' indicate at the very least that there was some discussion between the plaintiff and the first defendant regarding the RM50,000 advanced to the second defendant. So, on the state of the pleadings and what was said in the affidavits and documents before the court, it is not difficult to see that a serious dispute of fact has arisen on whether an oral guarantee was given at all, and in the light of the affidavit and documentary evidence I do not think that the plaintiff's claim, of having been given an oral guarantee by the first defendant, can be described as a frivolous or vexatious or scandalous claim or one made in abuse of the process of court. In my judgment, the seriously disputed question which has arisen between the parties on this point can only be

A decided at a trial and not on the basis of disputed facts stated in the affidavits on the hearing of a summary application.

B However, what has happened here is that although the first defendant flatly denies ever giving an oral guarantee to the plaintiff in respect of the sum advanced to the second defendant, he proceeded to apply to strike out the plaintiff's claim when the only credible basis upon which his application to strike out could be made was on the premise that there was such an oral guarantee in the first place, otherwise the question of its enforceability by virtue of s 4 of the Statute of Frauds would not even arise. But there is nothing in the record of appeal to indicate that the first defendant had admitted that he had 'indeed given a oral guarantee to the plaintiff.

C In my judgment this point is not unimportant because it was inappropriate for the learned sessions court judge to have proceeded to hear the first defendant's application without first reaching a decision on whether or not an oral guarantee had been given, as several consequences flow from the decision reached on the first line of defence. If a trial had been held to determine the first line of defence and after hearing the evidence the court comes to a finding that no oral guarantee was given, that puts an end to the plaintiff's claim. However, if the court were to find that an oral guarantee was given, then it must go on to consider (a) whether the Statute of Frauds is still applicable in Sarawak and, if so, then (b) whether the plaintiff has produced a sufficient memorandum in writing of the oral guarantee on which he sues.

E And in the event it becomes necessary for the court to consider the question in (b), then it is here that the evidence (both oral and documentary), which it had earlier acted on in arriving at its initial finding regarding the existence of an oral guarantee, will have an impact on how the court views the two documents 'TKS1' and 'TKS2' and whether they constitute a sufficient memorandum in writing of the oral guarantee within the meaning of the Statute of Frauds.

F Unfortunately in this case, the first defendant committed the learned session court judge to a course which led to her deciding the question in (b), ie that there was no sufficient memorandum in writing of the oral guarantee. It was inappropriate to do so because that decision necessarily involved the court in arriving at a finding of fact without the benefit of hearing evidence on the point. It was also inappropriate because the court had arrived at a finding of fact without the plaintiff having had the opportunity of presenting his evidence including evidence elicited through cross-examination relating to the circumstances in which the oral guarantee was given and the two documents 'TKS1' and 'TKS2' made.

H The plaintiff did not do so and the court did not have the benefit of hearing evidence on the point because no trial was held to decide on the primary question of whether or not there was an oral guarantee. Of course, the first defendant has submitted that as the plaintiff did not plead that there was a sufficient memorandum in writing of the oral guarantee, that question does not arise for consideration. I regret I do not agree with this contention. The disputed question of whether the first defendant had given an oral guarantee or not could only be decided at a trial. At the trial, all matters in dispute between the parties would be adjudicated. One of the matters on which there has already been a joinder of issue between the parties is the

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applicability of the Statute of Frauds. Since what is left of s 4 of the Statute of Frauds prohibits the bringing of an action unless there is a sufficient memorandum in writing of the agreement being sued upon, the joinder of issue between the parties would have covered the point and the plaintiff would have been entitled to lead evidence on it at the trial. If not, in order to put before the court for adjudication all matters in controversy between the parties, it would be open to the plaintiff to have resort to O 15(1) of the Subordinate Courts Rules 1980 under which the court may grant leave to amend a summons and or pleading at any stage of the proceedings whether before or during trial or even after judgment or on appeal, to plead that the two documents he has produced fulfill that purpose.

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Quite apart from what I have just said, even taking the approach which the learned sessions court judge did, can it be said that because of s 4 of the Statute of Frauds the plaintiff's claim is not maintainable and so it would be clearly vexatious and an abuse of the process of the court to allow the plaintiff to proceed further with it? Again, I do not think so because the issue of whether an oral guarantee is enforceable in Sarawak gives rise to a serious question. The court will have to decide as a matter of law whether s 4 of the Statute of Frauds is still applicable in Sarawak or whether the law on guarantees is now governed by the provisions of the Contracts Act 1950, which has since 1 June 1974 been extended to Sarawak. To resolve this issue the court will have to undertake a mature consideration of the various statutory provisions which the parties have referred to and which I have indicated earlier in this judgment. I do not think that it is suitable to decide this difficult question of law on a summary application.

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In the result, I do not think the learned sessions court judge adopted the correct approach in deciding the first defendant's application. For the reasons I have given, I do not think that it can be said nor is it suitable to decide at this stage that the plaintiff's claim is not maintainable. Sufficient facts and matters have been brought out by the plaintiff in his pleadings and on the affidavits which show that there are serious issues of fact and law that require to be investigated and decided at a trial. It certainly cannot be said that what the plaintiff alleges regarding the oral guarantee allegedly given by the first defendant is so obviously unsustainable or not maintainable and hence frivolous, vexatious and brought in abuse of the process of the court.

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Before concluding, I wish to say that although the parties, during the hearing of the appeal, had agreed that I could decide on the point of law which the learned sessions court judge had dealt with, for the reasons I have already given, it would be wrong to do so and so I have not.

I allow the appeal with costs. I set aside the decision of the learned sessions court judge and remit the matter back to the sessions court for trial before another judge.

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Appeal allowed.

Reported by Lim Lee Na

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